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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C.

In the Matter of

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Open Video Systems

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CS Docket No. 96-46

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COMMENTS OF THE TELECOMMUNICATIONS INDUSTRY ASSOCIATION  
IN RESPONSE TO  
NOTICE OF PROPOSED RULEMAKING

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APRIL 1, 1996

For the Commission

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## SUMMARY

The Telecommunications Industry Association ("TIA") suggests that the precursor of Open Video Systems ("OVS") -- Video Dialtone ("VDT") -- failed to lead to the development of any significant competition in the provision of wireline video services because it was too heavily regulated, and urges the Commission to avoid imposing a similar regulatory scheme on OVS.

The TIA proposes that the proper manner in which to regulate OVS is to recognize that new entrants into the video services marketplace face a significant task in seeking to displace an entrenched incumbent, and accordingly, such new entrants should be afforded maximum regulatory flexibility and access to programming so that they might effectively challenge the incumbent provider of video services. Other video-entry models are flawed by the absence of one or the other of these factors, and the absence of either regulatory flexibility or access to programming may be sufficient to render a new entrant's challenge unsuccessful.

The viability of the OVS concept is important to the successful realization of the goal of the Telecommunications Act of 1996, *i.e.*, two-wire competition. Carriers will be most likely to make the significant investment necessary to deploy interactive, broadband networks if they are afforded regulatory flexibility and an opportunity to derive a significant reward or return on their investment. Therefore, the TIA asks the Commission to create an environment conducive to broadband investment by establishing a regulatory framework for OVS which is both flexible and minimally intrusive.

In the Matter of )  
 ) CS Docket No. 96-46  
Open Video Systems )

The Telecommunications Industry Association ("TIA") hereby comments on the Notice of Proposed Rulemaking ("Notice") in the above-captioned proceeding, FCC CS Docket 96-46, released March 11, 1996. The TIA has a membership of nearly 600 U.S. companies which manufacture and provide communications and information technology equipment, products, systems, distribution services and professional services throughout the world.

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In 1991, the Commission took the initiative to encourage competition in the video marketplace by approving the video dialtone (“VDT”) concept and issuing regulations to implement this idea. Unfortunately, the VDT concept failed to establish any real competition in the wireline video services marketplace.

Why did the VDT concept fail? In large part, it failed because it was too regulatory.<sup>1</sup> The small degree of competition that is present in the video services marketplace has come from wireless service providers such as Direct Broadcast Satellite ("DBS") and, to an even less significant degree, from MMDS and microwave systems. These systems have succeeded where VDT failed because -- unlike

<sup>1</sup>The 1996 Act terminated the Commission's VDT rules and noted in the Joint Explanatory Statement of the Committee of Conference (at Section 653(c)(3)) that the VDT "rules implemented a rigid common carrier regime, including the Commission's customer premises equipment and *Computer III* rules, and thereby created substantial obstacles to actual operation of open video systems."

the companies that attempted to pursue a VDT strategy for entry into the video services marketplace -- they are subject to virtually no regulation.<sup>2</sup>

The stark contrast between the failure of VDT and the success of DBS should guide the Commission in its rulemaking on Open Video Systems ("OVS"). Should the Commission fail to learn from the mistakes of the VDT experience, wireline video services competition may not develop to any significant degree, as some of the largest and most likely providers of that competition -- local telephone companies and electric utilities -- may not aggressively pursue entry into the video marketplace. Such a development would have a profoundly negative impact on the deployment of broadband, interactive networks, as well as the future of local broadcast services. A lack of competition in the wireline video services marketplace will result in less than optimal investment in the wireline infrastructure<sup>3</sup> and force video service consumers to choose between taking service from the incumbent provider or DBS, in which case they will likely receive an inferior over-the-air broadcast signal or no signal at all.

In seeking to promote the development of robust competition in the wireline video services marketplace, the Commission must remove regulatory barriers and foster the development of a competitive climate that will encourage new market entrants to make the investment necessary for them to compete effectively with entrenched wireline providers of video service. These steps are necessary because new entrants face an enormous challenge in seeking to displace incumbent service providers. As Peter Drucker has noted, a new technology or service generally cannot displace an old one unless it is proven at least ten times better. Otherwise, the enormous investment in the installed base and the resources of the incumbent will block the new technology or service.

The Drucker concept generally applies to the telecommunications industry. For example, the cellular industry has succeeded because cellular technology gives the consumer more than ten times the

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<sup>2</sup>In fact, the regulations that most impact wireless providers of video service are the program access provisions of the 1992 Cable Act, which have actually had the effect of helping new entrants to gain a foot-hold in the marketplace.

<sup>3</sup>Encouraging "the rapid deployment of new telecommunications technologies" is the goal of the Telecommunications Act of 1996. The general model adopted by the Act to facilitate achievement of this goal is two-wire competition, as evidenced by the interconnection, "facilities-based" competition and anti-buy-out provisions of the legislation.

mobility of a traditional telephone with a cord or a cordless phone. Cable television operators have succeeded because they have ten times or more channels than the three major over-the-air networks. Many other technologies or services -- including VDT -- have failed because they could not leverage such an advantage.

With respect to video services, it is important to remember that the incumbent cable operator has a line (either coaxial cable or hybrid fiber-coax) into the home which has as much as 100,000 times the bandwidth of the telephone company's line (twisted pair) into the home. While technologies such as ADSL and HDSL, in conjunction with switched video, may progress over time to allow the commercial transmission of video over twisted pair, digital compression and other techniques will over that same time improve a cable operator's hybrid fiber-coax network. Therefore, telephone companies will be unlikely to satisfy the Drucker rule unless they construct broadband, interactive networks to replace or supplement the access to the customer provided by their twisted pair networks. This will be a very difficult task unless regulatory barriers and uncertainties are removed.

## **II. To Facilitate the Viability of OVS as a Vibrant Competitor, the Commission Should (1) Forbear From Applying Many of the 1996 Act's Restrictions and (2) Vigorously Apply the Program Access Rules**

Rather than imposing regulations that lead the industry down the same path taken by VDT or that create a "cable-light" scheme of regulation, the TIA suggests that the Commission employ a two-pronged approach to maximize the viability of OVS as a vibrant competitive alternative to incumbent video service providers.

First, it should employ the regulatory forbearance provisions of the Telecommunications Act of 1996 ("1996 Act") to remove as many of the restrictions on OVS contained in the 1996 Act as possible.<sup>4</sup>

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<sup>4</sup>The forbearance provisions of the 1996 Act instruct the Commission to forbear from applying any regulation or provision of the Communications Act if enforcement is not necessary to ensure that charges such service are just and reasonable, if enforcement is not necessary for the protection of consumers, and if forbearance is consistent with the public interest. With respect to charges for service and consumer protection, rates for OVS service will have to be competitive with those charged by incumbent providers of multichannel video service or consumers will not subscribe to OVS service; therefore, the first two parts of the three part test should be satisfied. As for the third part of the test, the 1996 Act specifically states that the promotion of competitive conditions is in the public interest. Accordingly, the Commission should be able to satisfy all three parts of the

The Commission's default in establishing rules for OVS should always be in favor of less regulation, and the Commission should avoid porting VDT (or VDT-like) regulations to OVS.<sup>5</sup> Second, the Commission should zealously apply the program access rules imposed by the 1992 Cable Act.

Without the regulatory flexibility that could be provided by application of the Commission's forbearance authority and access to programming, the OVS concept may fail like VDT, leaving DBS as the most likely alternative to incumbent cable systems -- a development that would diminish the likelihood that the vision of the 1996 Act, i.e., two-wire competition, will be achieved.

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In the view of the TIA, the forbearance/program access approach is advantageous because it provides potential market entrants with the regulatory flexibility and access to programming that will be necessary if they are to mount a challenge to incumbent providers of video service. The other market entry options provided by the 1996 Act either do not provide such flexibility or fail to provide adequate program access, and the absence of either will make it difficult for new entrants which begin with no market share and no market power to compete effectively with incumbents which have almost two-thirds of the market.<sup>6</sup> The shortcomings of the other entry options are as follows:

- The "wireless option" provided by the 1996 Act allows for the provision of video programming to subscribers through radio communication under Title III of the Communications Act. DBS does have some built-in advantages as an option, but DBS systems do not offer subscribers access to local programming and DBS can be a more expensive option when a household has multiple sets. Over-the-air broadcast

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forbearance test.

<sup>5</sup>In establishing a regulatory framework for OVS, the Commission should seek to avoid a repeat of VDT by using a "zero-based" system in which it considers (1) what is the least regulatory or intrusive way to implement the requirements of the Act, and (2) whether there are market forces or factors which allow for forbearance.

<sup>6</sup>According to a February 1996 Neilson report, cable operators serve 65.9 percent of the market (95 million households). DBS and other alternative providers serve approximately another 5 percent. Accordingly, while incumbent cable operators serve nearly two-thirds of the total market (in terms of homes which could be served), they actually account for about 90 of the market when only multichannel video services subscribers are considered.

and MMDS are not yet viable options, particularly since neither service has converted to digital. Even if these services are converted to digital technology, they are likely to remain limited by line-of-sight restrictions, rain fade and other technological problems.

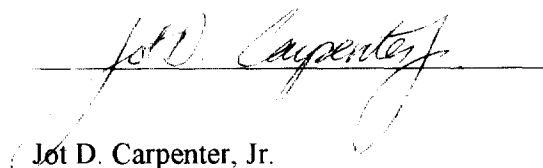
- The "common carrier option" provided by the 1996 Act allows common carriers to provide transmission of video programming on a common carrier basis under Title II of the Communications Act. However, any carrier opting for this solution is at a significant disadvantage because it cannot effectively package programming like a cable operator or DBS provider.
- The "cable system option" provided by the 1996 Act allows common carriers to provide video programming as a cable system that would be regulated under Title VI of the Communications Act. Any carrier selecting this option faces the very difficult task of dislodging an incumbent operator, an undertaking that is herculean in light of the Drucker rule.

To avoid these and other problems which might undermine its viability as a video-entry strategy, the Commission should use the tools given it by the 1996 Act to pursue a minimalist, deregulatory approach to regulating OVS. Any regulations which apply to OVS should be flexible and minimally intrusive, so as to incent potential competitors to incumbent cable operators to choose the OVS option as a video-entry strategy.

The TIA expects to submit more detailed comments in the reply round regarding how the Commission might adopt flexible, minimally intrusive regulations that will encourage carrier investment in OVS.

Respectfully submitted,

Telecommunications Industry Association



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